

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA)
)
)
v.) Crim. No. 05-10019-RGS
)
)
DANIEL W. McELROY and)
AIMEE J. KING McELROY)
)
Defendants.)
)
_____)

MOTION FOR EVIDENTIARY HEARING

The government hereby moves for an evidentiary hearing at the sentencing of defendant Daniel McElroy, and as grounds therefor, states as follows:

1. The government submits that insofar as the Sentencing Guidelines require the government to prove the amount of loss attributable to the defendant, an evidentiary hearing in this matter may be necessary because the defendant, through counsel, maintains that the government's loss calculations are invalid.
2. That said, the defendant has not articulated the basis of his objection, either verbally or in his written objections to the Presentence Report.¹ Instead, his counsel simply maintains, without elaboration, that he has no basis on which to conclude that the government's figures are accurate. Nor has he offered an alternate set of loss figures.
3. The defendant has all the information he needs to state the basis of his objection. He has all the information underlying the government's loss figures, along with the government's submissions to Probation which explain the methodology the government employed in its calculations. The government also has invited defense counsel to meet with the individuals who performed the calculations.

¹ Instead, the defendant objects to the government's reliance on loss figures that are different from those presented in the sentencing of cooperating witness Charles Wallace. On its face, this is a legal objection which the Court can address without an evidentiary hearing.

4. Based on the same information made available to defense counsel, the Probation Office has accepted the government's loss figures without amendment. Needless to say, the government believes that its loss figures are accurate and soundly derived.

5. In the event that the Court does not accept Probation's loss findings, the government requests an opportunity to present evidence concerning each of the three constituent parts of the total loss attributable to the defendant's scheme, namely the losses to the IRS, Commonwealth of Massachusetts, and the defendant's workers compensation insurers. For each loss component, the government would offer evidence in the form of a chart summarizing the loss calculations, and testimony of the individual who created the chart.

WHEREFORE, in the event that the Court does not accept loss figures set forth in the PSR, the government requests an evidentiary hearing so that it may present evidence supporting those figures.

Respectfully submitted,

MICHAEL J. SULLIVAN
United States Attorney

By: /s/ Jonathan F. Mitchell
JONATHAN F. MITCHELL
SARAH E. WALTERS
Assistant U.S. Attorneys

CERTIFICATE OF SERVICE

I hereby certify that this document, filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF) and that paper copies will be sent to those indicated as non registered participants on this date.

Dated: July 1, 2008

/s/ Jonathan F. Mitchell
JONATHAN F. MITCHELL